FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-479

STANLEY D. EDMONDS,
Petitioner,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondent.

REPLY BRIEF FOR PETITIONER

CALVIN W. BREIT,
C. ARTHUR RUTTER, JR.
Breit, Rutter & Montagna
720 Atlantic National Bank Bldg.
415 St. Paul's Blvd.
Norfolk, Virginia 23510
Attorneys for Petitioner
Stanley D. Edmonds

TABLE OF CONTENTS

Page

Summary of Argument 1

Argument:

I. Congressional Intent 4
II. The Court Should Not Hold Itself Free To Act 10
III. Joint And Several Liability 13
IV. Equitable Credit 16
V. The Burden Of Proportionate Fault Falls On The Longshoreman 20
VI. The Stevedore's Lien is Recoverable In Full . 21

Conclusion 23
Certificate of Service 26

TABLE OF CITATIONS

Cases	Page
Cella v. Partenreederei M.S. Ravenna, 529 F2d 15	9
Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974)	20
Director, Office of Workmen's Compensation Programs, United States Department of Labor v. Rasmussen, 47 U.S.L.W. 4159, (decided February 21, 1979)	12, 13
Dodge v. Mitsui Shintaku Ginko K.K., 528 F2d 669 (1975) cert. denied, 425 U.S. 944 (1976)	8
Griswold v. Conn., 381 U.S. 479, 482 (1965)	16
Halcyon Lines v. Haenn Ship Ceiling and Repairing Corp., 342 U.S. 382 (1952)	2, 5, 8, 11, 19, 20
Hard v. Krawill Mach., 359 U.S. 297 (1959)	12
Landon v. Leif Hoegh & Co., Inc. 521 F2d 756 (1975)	8
Lucas v. "Brinkness" Schiffahrts GES., 374 F. Supp. 759, (E.D. Pa. 1974)	8
Mobile Oil Corporation v. Higginbotham, 1978 A.M.C. 1059 (June 5, 1978)	11
Moragne v. State Marine Lines Inc., 398 U.S. 375 (1970)	12
Nacirema Operating Co. v. Dostiny, 456 F2d 956	21
Northeast Marine Terminal Company, Inc. v. Caputo 432 U.S.C. 49, 53 L.Ed. 2d 320, 97 S.Ct. 804 (1977)	8
Pope and Talbot, Inc. v. Hawn, 346 U.S. 406 (1953)	5
Reed v. S.S. Yaka, 373 U.S. 410 (1963)	1, 5, 6, 7
Ryan Stevedoring Co. v. Pan Atlantic S.S. Crp., 350 U.S. 124 (1956)	5
Samuels v. Empressa Lineas Maritimas Argentinas, 573 F2d 884 (1978)	9
Sea-land Services v. Gaudet, 414 U.S. 573 (1974)	12
Seas Shipping v. Sieracki, 328 U.S. 25 (1946)	5, 18
Seas Shipping v. Sieracki, 328 U.S. 25 (1946)	5, 18
Seattle First National Bank v. Shoreline Concrete Company 588 P. 2d. 1308 (decided December 28, 1978)	13
Shellman v. United States Lines, Inc. 528 F2d 675 (9th Cir. 1975)., cert. denied, 425 U.S. 936 (1976)	8, 9
The Schooner Catherine v. Dickinson, 17 H.O.W. 170, L.E. 233 (1855)	4
United States v. Barnes, 222 U.S. 513, 32 S. Ct.117 56 L.Ed. 291 (1911)	12
United States v. Reliable Transfer, 421 U.S. 397 (1977)	2, 10, 11, 16, 17
Voris v. Eikel, 346 U.S. 328 (1953)	7
Voris v. Gulf Tire Stevedores, 211 F2d 549	21
Zapico v. Bucyrus Erie Co., 579 F2d 714	9

Articles	Pages
Kosanin, Cargo Rights and Responsibilities in Collision Case, 51 Tulane L. Rev. 880 (1977)	11
Owens, *The Origins and Developments of Marine Collision Law*, 51. Tulane L. Rev. 759, 804 (1977)	11
Schwartz, Comparative Negligence, Paragraph 16.4 at Page 253	14
Steinberg, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Negligence actions by Longshoremen against shipowners - a Proposed Solution* 37 Ohio St. L.J. 767 (1976)	25
Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen and Harbor Workers Compensation Act*, 41 Ins. Counsel J. 63, 66 (1974)	7, 8

IN THE SUPREME COURT
OF THE
UNITED STATES

No. 78-479

STANLEY D. EDMONDS, Petitioner,

v.

COMPAGNIE GENERAL
TRANSATLANTIQUE, Respondent.

REPLY BRIEF FOR PETITIONER

SUMMARY OF ARGUMENT

In Section 905 of the amended LHWCA, Congress retained the rule that a longshoreman could recover his full damages from a vessel owner. That section also retained a longshoreman's right to sue his employer where the employer was a ship owner pro hac vice, as in Reed v. Yaka, 373 U.S. 410 (1963). Negligence of an independent party will not impose liability on the ship owner. The statute however does not adopt proportionate fault.

Halcyon Lines v. Haenn Ship Ceiling and Repairing Corp., 342 U.S. 382 (1952) remains good law even after the 1972 Amendments. Congress could easily have said otherwise if it meant to change Halcyon.

Although United States v. Reliable Transfer, 421 U.S. 397 (1977) changed the rule of division of damages in collision cases, the court there was not construing legislation but was dealing with a doctrine created by the courts. Where Congress has acted, the Court has repeatedly recognized it was not free to act to rewrite the statute. A remedial statute such as the Longshoremen's Act should not be restricted by judicial interpretation.

A single tort feasor is responsible for all the damages which his conduct proximately causes. Where two tort feasors have acted to cause an indivisible harm, both are responsible for making full compensation for the harm they have caused. This concept of joint and several liability survives under comparative negligence schemes. The doctrine of contribution among tort feasors is not used to restrict the injuried party's right to full compensation. Where land based law is to provide the basis for third party liability, the common law doctrine must continue and the injured person be permitted full recovery.

"Equitable Credit" is a misnomer where it is used to describe the reduction of an individual's right to recovery. The Act creates an equitable credit by holding the vessel liable only for negligence. But it is no equity to require the longshoreman to give up not only his unseaworthiness remedy (by statute),

but also his right to full damages under the negligence remedy (by judicial interpretation.).

The longshoreman has already given up the right to sue his employer in return for the assurance of compensation benefits. But where third party negligence is present, the longshoreman can recover his lost wages not repaid through compensation and his other full damages from the negligent party. To revise the longshoreman's rights judicially and reduce his right to damages without any corresponding benefit from the vessel places the added economic burden on the longshoreman, something nowhere required by Congress.

The stevedore's lien should be repaid in full rather than requiring the stevedore to litigate his right to recover the lien in every case. Congress, in the legislative process, required the stevedore to pay higher compensation benefits, but saved him the expense of litigation and protected the lien where third parties were negligent. Congress should make any changes in that scheme which may be deemed proper.

ARGUMENT

I. Congressional Intent.

Much ado has been made by Respondent about an apparent, but illusory, discrepancy between the first and second sentences in 33 U.S.C. 905 (b) as amended. By a strained and contrived literal reading of the words, Respondent reconciles the sentences as permitting only apportionment of damage. When read in the light of case law preceding the amendment and the legislative history, it becomes clear that Congress was not suggesting an apportionment of damages as outlined in the Fourth Circuit's opinion, rather the sentences refer to different factual situations. Read in that light, they are mere semantic distinctions without a conflict. The amendments were adopted prior to this Court's decision in Reliable Transfer. In 1972, when the applicable amendments were adopted, proportionate fault was not the general rule in maritime matters. The rule instead was one of equal liability (50-50) as between the wrongdoers, and that had been the rule for more than a century. The Schooner Catherine v. Dickinson, 17 H.O.W. 170, L.E. 233 (1855). The rule applied to collision losses but had never extended to non-collision matters. It would follow in the absence of a specific statutory undertaking or Congressional expression,

that Congress had considered, if anything a fifty/fifty (50-50) division and nothing more. Apportionment of loss in pro rata relation to degree of fault was a doctrine whose time had not yet come when the amendments were debated. But, the statutory language contains nothing to suggest that the Congress even considered such a proposal, much less adopted it. At the time of the amendments, Seas Shipping v. Sieracki, 328 U.S. 25 (1946) provided the injured longshoreman a cause of action against the shipowner for an unseaworthy condition unrelated to negligence, a strict liability in tort. Damages were recoverable to the full extent of his injury. Halcyon and Pope and Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) prohibited a claim over by shipowner against the stevedore for contribution. Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956) under a theory of implied contract rather than tort, effectively negated the consequences of Halcyon and Pope and Talbot, while carefully preserving the rule of law therein enunciated by this Court. At the same time Reed v. S.S. Yaka, Supra was alive and well and its rule was clear: while the LHWCA prohibited an action of the longshoreman employee against the employer as a stevedore, the action was permissible against his employer as a bare boat charterer, a shipowner pro hac vice. As this Court expressed in Reed, "In interpreting the Act the Court cannot now consider the wording of the statute alone. It must view it in the light of prior cases in this area, the holdings of which have been left unchanged by Congress." Id., at page 414.

With this historical background, we are faced with the inescapable conclusion that Congress, by

its 905(b) amendment had considered and expressly retained that portion of Reed which permitted an action against the stevedore-employer as a shipowner, but only lying in tort, and rejected that portion which followed Sieracki as well as Sieracki itself, i.e. the cause of action for an unseaworthy condition. Further, it becomes clear that congress in the amendments intended to abrogate the rule in Ryan which created the circular litigation, when it declared no contractual relationship implied or expressed, direct or indirect, could require contribution from the stevedore employer. All else Congress left unchanged.

The first sentence of 905(b) refers to any person covered under the act regardless of whence his employment came. The second sentence is limited to those cases where the injured person was employed by the vessel to provide stevedoring services. If "employed by the vessel" means that the injured longshoreman was actually an employee under a contract of employment of the shipowner, then it becomes clear that this sentence was intended to be limited only to a Yaka situation. Only if construction of that phrase "employed by the vessel" is strained to mean "working aboard the vessel" although employed by an independent contractor, could this sentence have any meaning other than in relation to Yaka. If it were so intended then, of course, there would be no need for the presence of the sentence in any event, because if the injured longshoreman is injured due to the negligence of an independent contractor retained by the shipowner, at common law the shipowner would have no vicarious liability resulting from such

negligence. Even before the amendments the injured longshoreman was not entitled to recover against the shipowner under the theory of negligence, solely because of the negligence of the third party independent stevedore. His recovery from the shipowner was founded either on shipowner negligence unrelated to the stevedore's or in "unseaworthiness" rather than negligence. Vicarious laibility for negligence does not fall upon the shipowner as the result of negligence of an independent party.

Inartfully drawn as the amendment may appear to shipowner here, any contrary finding is an inscrutable stretching and misinterpretation of the literal wording, an inapplicable linguistic analysis without regard to congressional intent applied contrary to this Court's oft stated view that the Longshoremen's Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results. Voris v. Eikel, 346 U.S. 328, 333, 98 L.E.D. 5, 10, 75 S.Ct. 88 (1953), Reed v. S.S. Yaka, supra.

Had Congress sought to reject the rule of Halcyon, a simple expression in the amendment would have accomplished this. Judge Haynesworth (Fourth Circuit) has misread into the second sentence of 33 U.S.C. 905(b) as amended, an intention to do so by substitution of a rule of proportionate fault when in fact the sentence's only purpose was to preserve Reed v. Yaka.

Judge Haynesworth cited Vickery, Some

Impacts of the 1972 Amendments to the Longshoreman and Harbor Workers Compensation Act, 41 Ins. Counsel J. 63, 66 (1974) for the proposition that the language of the house report strongly suggests an intention that the vessel be responsible for its proportionate part of any negligence when there is also fault on the part of the others. But nowhere is the term "proportionate fault" used in either the Act or the Congressional History. It is interesting to note that this Court has considered that very article in Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S.C. 49, 53 L.Ed. 2d 320, 97 S.Ct. 2348 (1977), interpreting the act on a point not here pertinent, and discounted the result expressed in the article for the self same reason.

Halcyon deferred to Congress any change in the rule of the common law on facts identical to those here. The Congress made clear by its specific reformation of Ryan and Sieracki, that it did not intend thereby to abrogate Halcyon, a dissolution which this Court said in Halcyon, should come from Congress.

The Second Circuit, in Landon v. Leif Hoegh & Co., Inc., 521 F2d 756 (1975), called upon to consider the issue, found Halcyon to be the post amendment law. In an excellent and well reasoned opinion, Lucas v. "Brinkness" Schiffahrts G.E.S., 374 F. Supp. 759, (E.D. Pa. 1974) District Judge Huyett, made a thorough review of the history of the legislation and concluded in accord; as did the Ninth Circuit in Dodge v. Mitsui Shintaku Ginko K.K., 528 F2d 669 (1975) cert. denied, 425 U.S. 944 (1976) and Shellman v. United States Lines, Inc., 528 F2d 675

(9th Cir. 1975)., cert. denied, 425 U.S. 936 (1976), the Fifth Circuit in Samuels v. Empressa Lineas Maritimas Argentinas, 573 F2d 884 (1978) and multiple other cases cited in the original Brief for the Petitioner (P.P. 25 and 26 orig. Brief for Petitioner); the First Circuit by suggestion in Cella v. Partenreederei M.S. Ravenna, 529 F2d 15; and again the Second Circuit in Zapico v. Bucyrus Erie Co., 579 F2d 714.

While Congress intended to free the shipowner of liability without fault in exchange for an increased compensation rate to the employee, it did not propose to destroy all other types of recovery. It remained for the employee to recover fully for a tort inflicted injury. Congress was concerned about the vessel owners' laxity in preventing injuries to longshoremen and therefore justly retained a cause of action against them in the event of their negligence. It becomes Congress' duty to do so, if it desires to proportion fault in derogation of the common law, and the present expressed statutory intent, not the duty of the Courts.

The issues involved here are of considerable importance to the maritime industry (Respondents Brief in Reply to Petition for Writ of Certiorari, Page 1) The multiplicity of amici briefs from every phase of industry and labor suggest to the Court the economic importance of the issue. It was as important during deliberations on the amendments as it is now. Had any intention existed on the part of Congress to reduce the award of the injured employee by other than his own negligence, no amount of incompetent draftsmanship could have

prevented it from being written into law with a simple phrase or clause — not even a sentence.

II. The Court Should Not Hold Itself Free to Act.

It is secondly argued that even if the shipowner is incorrect that Congress intended a system of proportionate fault, at least it was silent on the matter and therefore the Courts are free to act in that arena. Great comfort is taken in this Court's holding in Reliable transfer on that issue. Reliable, however, did not create a new theory of proportionate fault, nor is it related to the issue at hand. Reliable merely revised a common law theory of division of fault in collision matters by changing the percentages as between the two injured parties at fault more in keeping with their actual degree of fault. The Court was construing not legislation by Congress but a common law doctrine 120 years or more in being, created by the Courts and emerging from English maritime law from before the Magna Carta. The Court maintained the basic theory of divided damages, but recognized the potential unfairness between two parties jointly negligent, though in different degrees. The longstanding principle of divided damages remained, but the division became relative to fault, not equal.

Reliable Transfer then did nothing to the law of contribution. The sharing of collision damages between two ships at fault is a means of reallocating the damages all ready suffered by both in proportion to the fault of each; it is not passing of an outsider victim's judgment from one unhurt tort feasor to the

other. This Court in Halcyon was called upon then to overturn a rule of common law and deferred to Congress because Congress had enacted so much legislation in the area of maritime personal injuries. This Court did likewise in Mobile Oil Corporation v. Higginbotham, 1978 A.M.C. 1059 (June 5, 1978), when the Court deferred to Congress which had undertaken to cover the field of death on the high seas. Reliable Transfer, on the other hand, was dealing with a common law rule in which Congress had made no attempt to legislate.

Reliable did not change the law relative to the duties of both ships to an injured third party, nor did it change the law relative to cargo's rights to full recovery from the non-carrying vessel. It is significant that the Government argued in Reliable that cargo is entitled to the full recovery notwithstanding the proportionate fault set forth in the decision. See: Owens, *The Origins and Developments of Marine Collision Law*, 51 Tulane L. Rev. 759, 804 (1977); Kosanin, *Cargo Rights and Responsibilities in Collision Case*, 51 Tulane L. Rev. 880 (1977).

Further, Reliable is unrelated to the issue here. It speaks to the premise of two negligent parties with liquidated damages and the extent of liability, one to the other; not to the issue of a third party whose injury is caused jointly by the two. A different rule of law evokes there, as well it should.

Counsel for Respondent argues that absent specific legislation to the contrary, the Court should adopt a rule reducing the damages to which an

injured employee was heretofore entitled. Citing Moragne v. State Marine Lines, Inc. 398 U.S. 375 (1970) and Sea-land Services v. Gaudet 414 U.S. 573 (1974) both of which extended and enlarged the rights of the individual and his family to seek redress, counsel relies on them now to reduce those rights. The shipowner argues this, while conceding that the Act should be liberally construed. Because Congress failed to spell out explicitly that it was not adopting a rule of reduced damages, the shipowner argues that such a rule should be adopted. The contrary, however, is more correct. The proper rule of logic and statutory construction is that unless a statute provides for the abrogation of a settled principle of law, particularly one which provides rights and remedies of person over property, that principle of law remains in force. The statute must be construed strictly in light of the claim of shipowner that it is intended to limit common law rights of the injury workman. See Robert C. Hard v. Krawill Mach., 359 U.S. 297 (1959).

As Mr. Justice VanDeventer wrote in the United States v. Barnes, 222 U.S. 513, 32 S. Ct. 117, 56 L.Ed. 291 (1911),

> "Where there is subsequent legislation on a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears."

As this Court states, writing through Mr. Justice Rehnquist in Director, Office of Workmen's Compensation Programs, United States

Department of Labor v. Rasmussen, 47 U.S.L.W. 4159 (decided February 21, 1979) wherein the Court was reviewing disability and death benefit provisions of the Longshoremen and Harbor Workers Compensation Act Amendments of 1972, "Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a line.' Our task is to interpret what Congress has said;—"

III. Joint and Several Liability

It is contended that joint and several liability is not an issue in this case because the stevedore employer is not a joint tort feasor in the strict sense, since he has statutory immunity from liability to the injured employee. If we accept the proposition that the employer-stevedore was not a joint tort feasor to the injured plaintiff, then it would follow that the sole tort feasor in the picture is the shipowner and none of the common law rules with respect to joint and several liability as it applies to joint tort feasors have any application to a sole tort feasor. Instead we are dealing then with a sole tort feasor who is fully liable for all of the damages sustained by the injured plaintiff less, of course, the statutory reduction permitted under the doctrine of comparative fault of the claimant. An excellent treatise on this important issue just recently came forth from Justice Stafford of the Supreme Court of the State of Washington in Seattle First National Bank v. Shoreline Concrete Company 588 P. 2d. 1308 (decided December 28, 1978.). The Court pointed out that it has long been recognized that the single tort feasor is liable for all damage for which his tortious conduct is

a proximate cause. Joint tort feasors are those who have acted in common or have breached a joint duty and concurrent tort feasors are those whose independent acts concur to produce injury. Significantly, the harm caused by either joint or concurrent tort feasors is indivisible. The duties which each breach may be different or divisible duties, but the injury or harm created is not. Each tort feasor's conduct is found to have been a proximate cause of the total indivisible harm and there is no reason for relieving that tort feasor of his responsibility to make full compensation for all the harm of which he has been a proximate cause. The Court then went on to explain comparative negligence and clearly suggests that the doctrine of comparative negligence does not require dissolution of the concept of joint and several liability of tort feasors. Comparative negligence represents a doctrine intended to operate in favor of an injured party by allowing, rather than barring, recovery by one who is contributorily negligent. The concept of joint and several liability of tort feasors has been retained under comparative negligence unless the statute creating comparative negligence specifically abolishes it in all states that have called upon to decide the question. Schwartz, Comparative Negligence. §16.4 at 253. Nor does the trend toward allowing contribution between or among multiple tort feasors in distributing responsibility for paying damages suffered by an injured party require a reduction in that injured party's initial right to recover in full. Contribution between joint tort feasors is a plan which operates exclusively between or among joint tort feasors and is not to be used as a vehicle for restricting an injured party's right to seek

full compensation from the tort feasor he may elect to sue. (Under the law of obligations each tort feasor is liable for the full amount of the victim's damage. When one of the tort feasors is protected by an immunity, such as here, the victim's action is rendered legally inoperable, but if the impediment to that action were removed the obligation would continue to exist, as in the Suits in Admiralty Act, which waives the governmental immunity to actions.) Hence, the immunity of a tort feasor to an action is no impediment to speaking of his liability for the obligation any more than uncollectibility makes a judgment invalid. A tort feasor is a wrongdoer. Two wrongdoers each contributing to an injury are jointly wrongdoers. No stretch of free translation can convert the simple meaning of joint tort feasor. The rule of law was and has always been both in maritime and land based law, that in absence of statute, there is a duty imposed on each to be responsible for the whole to the injured party, regardless of their degree of fault. The harm sustained is an indivisible harm although two or more parties may have each separately been a proximate cause of the injury. The question is whether or not a statutory limitation or immunity for one of the wrongdoers reduces the otherwise right to full recovery from the other. Quite apart from the terminology used, and without regard to joinder or non-joinder of others, the common law principle has been and is: A tort feasor is liable for the entire loss sustained by the injured even though the wrongdoer's acts concurred with another to produce the result. This has been the law maritime, which the shipowner asks this Court to abrogate in its traditional role of formulation of equitable and

fair admiralty rules. This Court, however, is guided by statute, and is not left to its common law flexibility in the instant matter. Of no small moment is Congress' specific intonement that the theory of liability be land based, and under land based theories of liability the injured party is entitled to the same full recovery. This Court does not function as a "super-legislature" to determine the wisdom, need and propriety of laws that touch economic problems, business affairs or social conditions. Griswold v. Conn., 381 U.S. 479, 482 (1965). Although members of the Court may feel a certain construction may better serve the interests of justice, the Court will better fulfill the function which the American system has assigned it by confining its analysis to the statute and the legislative history.

IV. Equitable Credit.

The doctrine of "Equitable Credit," apportionment of liability, or by whatever other name, when applied to two common law wrongdoers, strangers to each other, as between themselves, all as reflected in "Reliable," is a just principle. No quarrel can be found at that level of application. The equities become obtuse, shrouded, and more subtle when the same nomenclature is applied to reduction of an individual's right of recovery under conditions here obtained. We deal here not with strangers, but with a shipowner and a stevedore with mutual financial interests, doing business together, sharing profits, in great part produced by the efforts of the longshoreman's labor, and in time passing on all costs to the ultimate consumers of their respective services. To that

interesting alliance comes the competing interest of the worker who before 1972 had in all practical matters the right of full recovery for his injury irrespective of fault. What therefore may have been a fair rule under the factual circumstances reflected in Reliable is tempered by the economic loss which the longshoreman has suffered in giving up the right, and by the added costs of compensation which post-1972 the stevedore assumed.

It is the exception rather than the rule that the injured can find a meritorious cause of action based on negligence of the shipowner as distinguished from unseaworthiness. It is now impalpable that such negligence, if found, whould not vicariously pass to or be shared by the stevedore in charge of the work at the time of injury. In brief, the "Equitable Credit" is a misnomer. It is an "inequitable credit." The inequity in it falls solely upon the employee, who in only the most ethereal of cases will find the shipowner at fault to the exclusion of the stevedore-employer. The equitable credit to which the shipowner is entitled rests in the Act and the quid pro quo of all parties helping to produce it. It is not an equitable credit on a case by case basis, but rather a larger more encompassing credit which says:

> "You, shipowner, no longer are responsible for an unseaworthy condition aboard your vessel in absence of fault. You receive a full and complete credit against any right of recovery formerly permitted against you, when you share no fault. However, when you are negligent, you shall continue to shoulder the full economic burden of the loss sustained."

This is equitable credit working at its fairest. We apportion your loss, not on case by case basis, but on industry wide basis, after hours upon hours of congressional deliberations, weighing the economic and social problems and the burden on the Courts in each ultimate decision.

Congress did not intend to take the last vestiges of recovery from the injured worker. It intended to alleviate the heavy burden placed upon his family when his injury made him incapable of providing the everyday needs of life. Long delays between his injury and his ultimate recovery often left the family destitute. Compensation before the 1972 amendments was grossly inadequate and, in most instances, barely life supportive. The longshoreman exchanged the almost absolute right of recovery permitted by Sieracki for a less adequate, but prompt and regular weekly award. But he was not asked to give up everything. The "Equitable Credit" which he provided was the loss of his most certain cause of action.The near automatic institution of suit against the shipowner upon the happening of an industrial accident no longer occurs. Today each injury is carefully weighed by plaintiff's attorneys everywhere to first determine if a meritorious cause of action exists, and only after an affirmative finding does counsel, with payments contingent, accept the assignment. In the practical aspects of the rules of negligence and the duties imposed on the shipowner to the longshoreman and the corresponding duties imposed on the stevedore, it would appear that rarely could the longshoreman expect a verdict which did not place a large percentage of the fault on the stevedore wrongdoer.

To continuously reduce the longshoreman's award by that percentage would most assuredly destroy the rights of longshoreman to seek his justified redress in our Courts, if only because of the sheer inadequacy of recovery available to him. If the function of our judicial system is thus made unavailable to the injured worker because of economic facts of life, we have done a grave disservice to the interest of justice, to equity and to fairness, which Respondent espouses is concomitant to "proportionate fault."

It is argued that Halcyon is no longer viable because although not expressly overruled, a substantial difference existed in the procedure of the LHWCA when the decision was rendered. This conclusion however, is a misreading of the act as it works today. The only difference in substance between pre-Halcyon days and today is the disappearance of the need to elect previously imposed on the longshoreman. The difficulty of determining the statutory benefits are identical today as then. In these matters where the injury and disability are temporary, compensation payments have been completed and the amount of compensation is fixed and liquidated at the time of settlement or suit. Where, as in the instant case the disability is long lasting and permanent, the amount of compensation changes upward from week to week. The amount is practically indeterminable. Particularly is this true under the amendments where payments change annually in relation to the inflation rate. It is conceivable that an actuarial calculation based on life expectancy

could be made, but at best it would be conjectural and in any event existed prior to the amendment as well.

Although Respondent in its Brief (p. 26) argues that Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974), overruled Halcyon, it would appear to the contrary that Cooper, decided unanimously by this Honorable Court after the 1972 amendments, but on an action created before the amendments, reasserts that "our decision in Halcyon was, and still is, good law on the facts," id. at 115. The instant case is, as in Cooper, indistinguishable from Halcyon.

V. The Burden of Proportionate Fault Falls on the Longshoreman.

Under the concept of workmen's compensation, a workman takes less than his full damages from his employer, but takes promptly and without regard to causation, in return for relinquishment of an uncertain claim for full damages based on the negligence of his employer. If no third party tort feasor existed, that, in itself, would strike a fair and equitable solution between employee-employer. Both would have given up something. But where a third party's negligence contributed to the injury, the reason for the rule and the equity of the arrangement no longer exist. This was one of the many problems envisioned by Congress in its deliberations and was resolved by specifically permitting the third party cause of action and simultaneously prohibiting any direct or indirect

contribution from the stevedore.[1]

Under compensation alone, the employee is paid medical expenses and a portion of his wages. He gives up all non-pecuniary elements of damage, as well as the balance of his wages. To hamper him now from a recovery for those full damages places the entire economic burden upon him and effectively destroys his rights to redress. Had Congress intended for the injured worker to lose all causes of action embraced under the common law it would have been simple to so state. A rule of proportionate fault or equitable credit seeks to do by indirection what Congress says cannot be done directly or indirectly.

VI. The Stevedore's Lien is Recoverable in Full.

The question of how any jury verdict against a ship owner should be divided between the longshoreman and a concurrently negligent stevedore is not before this Court. Whether the entire

---

[1] Amicus Brief of Pacific Merchant Shipping Association—p. 40, in an obvious misconception of fee arrangements — suggests that the burden of proportionate liability falls on employees counsel, not employee.

Using Stanley Edmonds figures allowing a $90,000.00 recovery, counsel's charges to Edmonds would be $13,500.00, one-third of the recovery above the lien; not $30,000.00, as suggested by amicus. From the remainder Edmonds would repay the full lien to the stevedore carrier and receive full credit, notwithstanding the charge against the stevedore of an attorney's fee on its share of recovery. Thereafter, the injured employee will be subjected to a credit against furture payments of compensation only to the extent of the net amount received by him after attorney's fees and all other expenses of trial. See Voris v. Gulf Tire Stevedores, 211 F.2nd 549, and Nacirema Operating Co. v. Dostiny, 456 F. 2nd 956.

compensation lien would have to be repaid by the longshoreman on those facts was not decided by the Fourth Circuit opinion. The issue is a red herring injected by shipowner and his amici. However, the great detail devoted to this question in those briefs requires some response from longshoreman here.

A major consideration of Congress was to reduce—not terminate—litigation in the crowded judicial system. It sought to terminate a third party action against the employer and the massive expenses and consumption of effort associated therewith. The stevedore's lien is recoverable in full, therefore, on three bases.

First, the failure to permit recovery would require extended additional litigation involving the stevedore to determine the extent, if any, to which he should be charged. The stevedore cannot and should not look to his employee's counsel to satisfy him on that issue. Circumstances dictate that there are times when a conflict between the two may exist. Stevedore should not be bound by an ex parte finding of fault in its absence. Would the employee to estopped from asserting another and greater degree of fault, or the stevedore, au contraire, a lesser in the interpleader action? Are not employer and employee at different poles on the extent of damages and the degree of permanency? In the instant case, under the Fourth Circuit ruling the stevedore is required to be impleaded and the attendant costs are specifically what Congress sought to prevent.

Secondly, equity and fairness require the full amount to be repaid. The stevedore has, under the

legislative give and take which give rise to the amendments, increased his compensation payments substantially. Although they do not fully compensate the injured worker, they nevertheless have greatly increased the burden to the stevedore. The burden is ameliorated by the savings in litigation expenses and the right to recover in full when and if the injured party has a cause of action for negligence against a third party.[2]

Thirdly, Congress intended it and Congress should amend it if it proves unfair.

CONCLUSION

The purpose of the act is to benefit the injured worker and provide him with needed funds during disability without unduly burdening the shipowner or stevedore. It is purely statutory in creation and must be liberally construed to benefit the worker. A dispute between the shipowner and the stevedore over their respective obligations is ephemeral at best because ultimately the increased or decreased fees of the compensation carrier, based on their reasonable entitlements to profit will be passed on to the shipowner in the stevedore charges for services. Therefore, the only party truly to suffer by the so called "Equitable Credit," "Murray Credit," or

---

[2] It must be noted here, that even if employer prevails, and is awarded full recovery, the compensation carrier does not necessarily recover all it has paid and is obligated to pay. Frequently future payments will exceed the employee's recovery, and the stevedore—employer remains liable notwithstanding. Full indemnification, as recited in Amicus Brief, is not always available to the stevedore, especially, as here, where compensation is ongoing.

proportionate fault doctrine is the longshoreman, who can least afford to assume that burden and who, equitably should be at least responsible for that assumption.

Upon examining the relevant authorities with respect to the problems raised when the longshoreman's injury is caused by the concurrent negligence of the shipowner and stevedore-employer, one is immediately struck by the incongruity between the views espoused and the parties who espouse them. First, many of the professional law review articles appear to have been written by attorneys who represent primarily shipowner interests. Second, there appears to be a noticable lack of professional works that support the longshoreman's interests. The incongruity arises when one recognizes that these pro-business as opposed to labor groups traditionally have tended to advocate judicial restraint rather than activisim. The rationale underlying this approach is clear: judicial activism has historically represented a trend toward greater employee recovery at the cost of the employer or third party. Under the 1972 amendments, however, the implementation of an activist approach by the courts would signify more favorable treatment for the shipowner. Hence, the party who would ordinarily argue that restraint is the proper role for the judiciary is now asserting, of course employing other terms, that only judicial activism can cure the ills created by Congress.

In all due respect to these commentators, judicial restraint and not activism is the proper

solution for the problem posed by the 1972 ammendments. This approach may lead to injustices on certain occasions, but Congress, and not the judiciary, enacted the amendments. Further, it must be emphasized that although judicial activism may at times be proper, the issues present in this area involve complex policymaking decisions. Judicial interference can only complicate an already confusing situation. If statutory modification of the 1972 amendments is necessary, this task should be accomplished by the legislature. Steinberg, The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Negligence Actions by Longshoremen Against Shipowners - a Proposed Solution 37 Ohio St. L.J. 767 (1976).

WHEREFORE, it is respectfully submitted that the opinion of the Fourth Circuit is erroneous and should be reversed by this Honorable Court and judgment entered in favor of Stanley Edmonds in the amount of the jury's verdict.

RESPECTFULLY SUBMITTED

Calvin W. Breit

CALVIN W. BREIT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief were mailed, postage paid, to Charles F. Tucker, Esquire, Vandeventer, Black, Meredith and Martin, One Commercial Place, Virginia National Bank Building, Norfolk, Virginia, attorney for the Respondent; to David R. Owen, Esquire, Messrs. Semmes, Bowen & Semmes, 10 Light Street, 11th Floor, Baltimore, Maryland 22102, attorney for Liberty Mutual Insurance Company, amicus curiae; to Paul S. Edelman, Esquire, Messrs, Kreindler & Kreindler, 99 Park Avenue, New York, New York 10016, attorney for American Trial Lawyers Association, amicus curiae; Thomas D. Wilcox, Esquire, 919 Eighteenth Street, N.W., Washington, D.C. 20006, attorney for National Association of Stevedores, amicus curiae; to Graydon S. Staring, Esquire, Messrs. Lillick, McHose & Charles, Two Embarcadero Center, San Francisco, California 94111, attorney for Pacific Merchants Shipping Association, amicus curiae, and to Randall C. Coleman, Esquire, Messrs. Ober. Grimes & Shriver, 1600 Maryland National Bank Building, Baltimore, Maryland 21202, attorney for American Export Lines, et als, amici curiae, this 12 day of March, 1979. 40 copies to Clerk, United States Supreme Court, Washington, D.C.

CALVIN W. BREIT
Attorney for Petitioner